FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1976

No. 76-316

John R. Bates and Van O'Steen,
Appellants,
v.
State Bar of Arizona,
Appellee.

On Appeal from the Supreme Court of Arizona

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

Justin A. Stanley
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

H. Blair White
Robert D. McLean
David T. Pritikin
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Attorneys for Amicus Curiae, American Bar Association

La Salle Street Press — Chicago
Printed in U.S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,
Appellants,

v.

STATE BAR OF ARIZONA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary bar association whose membership is open to the members of the bar of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 200,000 members. One of the most important purposes of the ABA is the development and recommendation of professional standards, including ethical rules on the dissemination of in-

* This brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

formation to the public. The permissible scope of such rules which the States are free to adopt and the First Amendment rights of the ABA to recommend such rules to the States may be significantly affected by this case.

SUMMARY OF ARGUMENT

The extent to which and the manner in which lawyers should be permitted to advertise constitute only one aspect of the broader and more complex problem of how information about the availability of legal services should best be disseminated to the public. In determining which practices should be allowed, the States are obviously concerned with preventing false or misleading communications as well as communications which confuse or fail to inform. Because of the wide variation in needs of individual clients, differences in ability and experience among attorneys, and the disparity of knowledge between lawyers and laymen with respect to legal matters, communications concerning professional services present special problems which do not arise in connection with the advertising of standardized products.

The prevention of misleading, confusing or non-informative announcements is not, however, the only concern of the States. Certain forms of information dissemination concerning legal services may affect the quality and nature of those services, may compromise the independence of an attorney, may draw into question the integrity of the judicial process, may encourage the bringing of litigation for improper motives, and may have other adverse consequences for the judicial system.

Appellants acknowledge the need for regulation of advertising by attorneys but focus upon what they characterize as the "overbreadth" of the Arizona regulations.

However, the Court has never applied the overbreadth doctrine to economic regulation or to commercial speech, and to do so would seriously impair the power of Congress and the States with respect to economic matters.

The question presented in this case is whether the States are required by the First Amendment to follow a single uniform approach having as an indispensable element the toleration of newspaper advertising like that published by appellants. Neither the case law nor public policy supports such a rigid result, given the uncertainty of the consequences of any particular approach to advertising by lawyers, the current study and experimentation with alternative approaches, and the varying circumstances in different regions of the country.

Appellants' reliance upon the Sherman Act as an alternative basis for attacking the Arizona regulations should also be rejected. The challenged rules were adopted by the Arizona Supreme Court in 1970, and differ in certain important respects from the rules recommended by the ABA at that time. The Arizona rules thus represent the action of the State acting as sovereign and are therefore not cognizable under the antitrust laws. That the Arizona rules were generally modeled on proposals made by *amicus* American Bar Association is irrelevant. To fail to include these rules within the protection of the state action exemption to the antitrust laws by virtue of the fact that they were proposed initially by private parties would be directly to impinge upon the First Amendment rights of those private parties to petition the Government.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT REQUIRE EVERY STATE TO PERMIT UNRESTRICTED NEWSPAPER ADVERTISING OF THE PRICES OF PURPORTEDLY STANDARDIZED LEGAL SERVICES BUT RATHER ALLOWS THE STATES FLEXIBILITY IN DETERMINING PERMISSIBLE METHODS OF ENSURING PUBLIC AWARENESS OF THE AVAILABILITY OF LEGAL SERVICES.

Unrestricted newspaper advertising by individual practitioners constitutes only one potential device that might conceivably be used to enhance public awareness of the availability of legal services. The problem of determining which types of communications should be employed is a complicated one, which State regulatory authorities should be permitted to approach in a variety of ways consistently with the First Amendment.

A. States Have Broad Power To Regulate Advertising By Lawyers.

In two recent cases, the Court considered the applicability of the First Amendment to State laws prohibiting certain types of "commercial speech." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 96 S. Ct. 1817 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). These decisions set forth the principles which should be controlling here—that commercial speech is subject to State regulation where justified by legitimate State concerns and that the special nature of professional services must be taken into account in assessing restrictions on advertising of such services.

In *Bigelow,* the Court held that a Virginia statute making it unlawful to prompt an abortion was unconstitutional as applied to an advertisement concerning the availability of

abortions in New York. While the Court pointed out that Virginia had no legitimate interest in the statute as applied since "Virginia possessed no authority to regulate the services provided in New York," the Court also held that "[t]he State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders." 421 U.S. at 824, 827. More recently, in the *Board of Pharmacy* case, the Court considered a Virginia statute prohibiting the dissemination of price information on prescription drugs. The statute was declared unconstitutional because the State had failed to offer any legitimate justification for the prohibition of such price advertising. 96 S.Ct. at 1829-30. Indeed, the implausibility of the reasons given by Virginia for the ban led to the conclusion that "the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is." 96 S.Ct. at 1830. As in *Bigelow,* the Court held that commercial speech is different from other forms of speech and "a different degree of protection is necessary . . ." 96 S.Ct. at 1830, n. 24. *See also* concurring opinion of Mr. Justice Stewart, 96 S.Ct. at 1832-35.

With respect to advertising by the professions, the Court noted that "consideration of quite different factors" would be called for. Physicians and lawyers "do not dispense standardized products," (96 S.Ct. at 1831, n. 25) and as a result, the "dangers of abuse and deception" may be greater at the professional judgment level, "when the advertised commodity [is] prescribed by a physician," than at the sale level when the commodity is "dispensed by a licensed pharmacist." 96 S.Ct. at 1822. *See also* concurring opinion of Mr. Chief Justice Burger, 96 S.Ct. at 1831-32.

The *Bigelow* and *Board of Pharmacy* decisions are thus consistent with earlier cases upholding restrictions on advertising by the professions. *Toole* v. *State Board of Dentistry,* 300 Mich. 180, 1 N.W.2d 502, *appeal dismissed,* 316 U.S. 648 (1942); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935). *Cf., Head* v. *New Mexico Board,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955), also sustaining the constitutionality of State advertising prohibitions. The "balancing [of] interests" to which the Court referred in *Bigelow* (421 U.S. at 826) and the unique considerations relevant to ethical restrictions on professional conduct require that the restrictions now challenged be considered in light of the social objectives that they are intended to serve.[1]

The power of the States to regulate lawyer advertising is obviously far broader than the authority merely to prohibit announcements that may be misleading, confusing or non-informative. No one would seriously question the power of a State to prohibit an attorney from holding himself out as capable of influencing a tribunal through political, fraternal, religious, or family connections even if such communication was true. As noted in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975), "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Nor would anyone question the power of a State to prohibit the personal solicitation of clients in hospital wards, at accident sites, and in other situations where undue influence might be brought to bear by some, but not all, attorneys. Even appellants have conceded the undesirability of these practices.[2] Similarly, advertising intended to incite particular individuals to bring lawsuits against other named individuals would constitute the statutory crime of barratry in many States, and such practices may be contrary to the social policy of encouraging, wherever possible, the amicable resolution of controversies. Thus the prohibition of misleading or confusing communications, while important, is obviously not the exclusive legitimate objective of regulations which pertain to lawyer advertising.

[1] Appellants seek to analogize the regulations challenged here to the types of State action considered in *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar,* 389 U.S. 217 (1967); and *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576 (1971) (Appellants' Br. 38). *See also* Brief of *Amici Curiae* Consumers Union of United States, Inc. *et al.,* 6-10. However, the First Amendment rights considered in those cases are entirely different from the claims made here. Those cases concerned First Amendment freedom of association of unions and of other groups "to cooperate in helping and advising one another in asserting their rights" and "to act collectively to secure" counsel. *United Transportation Union,* 401 U.S. at 578-79. Since the present case does not concern any First Amendment claim other than the allegation that the public is deprived of certain commercial information, the principles of law which are controlling here are set forth in *Bigelow* and *Board of Pharmacy.*

B. In Determining Appropriate Controls Upon Lawyer Advertising, State Regulatory Authorities Are Concerned With The Question Of How Information About The Availability Of Legal Services Should Best Be Disseminated.

The question of lawyer advertising is only one aspect of the broader problem of how information about the availability of legal services may best be disseminated.[3] The solution involves the difficult reconciliation of competing

[2] *See,* Brief for the Appellants ("Appellants' Br."), 53; Testimony of Van O'Steen, Transcript of Proceedings before Special Local Administrative Committee of Arizona State Bar, April 7, 1976 ("Tr."), 56-58, 74-75.

[3] As explained more fully *infra,* the Arizona regulatory scheme now at issue contemplates a range of methods other than unrestricted newspaper advertising of individual practitioners by which information about legal services may be disseminated, including, *inter alia,* advertising by bar association lawyer referral services, group legal services programs, and public interest law firms.

social concerns. An important objective of a State's regulatory scheme should be to encourage the education of laymen to recognize their legal problems, to facilitate the process of intelligent selection of counsel, and to assist in making legal services fully available.

The interest of the public in achieving these objectives vastly outweighs the interest of attorneys themselves in being able to broadcast commercial messages intended to increase the "volume" of their business.[4] A lawyer is granted a license to practice by the State, and he holds a position of special trust and obligation. As the Court recognized in *Cohen* v. *Hurley*, 366 U.S. 117, 130 (1961), the permissible scope of burdens placed upon lawyers is significantly different from that of burdens ordinarily placed on individuals making constitutional challenges to State regulatory actions.

State regulatory authorities seek selectively to determine which practices may without adverse consequences enhance public awareness of the availability of legal services and contribute to the informed choice of counsel. It is no accident that every State, various federal agencies and many State and federal courts closely regulate advertising and solicitation by attorneys. This regulation is supported by a number of important State interests.

1. Since Legal Services Are Not Standarized, Most if not All of the Information That a Lawyer Might Communicate to the Public at Large about His Abilities or Fees Would Be Non-informative or Non-comparative.

The problems posed by lawyer advertising are not confined to communications that are *intended* to mislead or deceive. In contrast to the consumer of prescription drugs, who knows what he needs and can obtain the same drug of

[4] *See*, Appellants' Br. 8-9; Van O'Steen test., Tr. 78-79.

identical quality from any source, the consumer of legal services is unaware of what services he needs, and the quality of those services may vary substantially. Consequently, most if not all of the apparently truthful and seemingly straightforward information that a lawyer can disseminate about his abilities or fees is at best non-informative and at worst confusing and misleading.

For example, the publication of objective data on litigation results, although possibly truthful and not intended to deceive, may give rise to an unwarranted inference of exceptional ability. Yet such information is inherently non-informative or non-comparative. As every trial lawyer recognizes, the relative capabilities of attorneys cannot necessarily be determined from a comparison of data on litigation results since the outcome of any particular case depends on particular facts. Because the quality of legal services cannot be measured objectively, virtually every commentator who has considered advertising by attorneys has concluded that any advertisement claiming or implying the superiority of a particular attorney or attorneys properly may be proscribed as unfair or deceptive. The Department of Justice in its *amicus* brief herein does not dispute this view. *See* Brief of the United States as *Amicus Curiae* at 29.

The public's vulnerability to misinterpreting information is perhaps greatest with respect to fee information. In addition to the problems presented by attempts to advertise set, standardized fees for services which vary in nature and quality, less specific fee information also encourages misinterpretation. For example, hourly rates not only provide no information concerning the quality of services but also do not generally provide any meaningful indication of overall cost since the layman is unlikely to have an accurate impression of his needs and the services that must be per-

formed. Nor would a comparison of published hourly rates indicate which lawyer would perform services at the lowest cost, since the efficiency and experience of a lawyer are as important factors in total cost as his hourly rate.

Publication of contingent fees based on a percentage of recovery would pose similar problems. The announced percentage would say nothing about the amount and timing of the client's recovery. A lawyer can more easily advertise a low percentage if he follows a practice of settling many cases quickly. Whether this practice is good or bad is not clear. The point is that a consumer who is informed only of a percentage contingent fee does not receive meaningful or comparable information.

The problem of misinformation is even more severe with respect to the approach followed by appellants, who advertised their willingness to perform particular services for prescribed fees. Such advertising conveys nothing about the quality of such services and does not enable a consumer to judge whether the offered services are adequate for his needs.

Appellants' response is to assert that "some services, such as those advertised by appellants, are relatively standardized" and that this standardization eliminates differences in quality and the possibility of misunderstanding. (Appellants' Br. 45) This argument, however, overlooks the variables in particular cases that may complicate even matters which are seemingly routine.

For example, appellants' advertisement states that an "uncontested" divorce would cost $175 plus $20 court filing fees. However, as appellants have conceded, only upon consulting a lawyer might the clients realize that their "uncontested" divorce is not their exclusive legal need. A variety of problems, relating to alimony, life insurance, tax

refunds, tax liabilities, disposition of property rights, and child custody, are likely to arise in connection with a divorce —even in connection with a divorce that is "uncontested" in the sense that both partners seek termination of the marriage. (O'Steen test., Tr. 64-67)

An "uncontested divorce," in most situations, entails the performance of a variety of services other than the processing of court papers, which is apparently the only service appellants offer to perform for $195. (O'Steen test., Tr. 63) Indeed, the processing of court papers is the most straightforward part of the lawyer's responsibility. Far more difficult is his diagnostic function, which he performs by asking his clients questions that would not occur to the layman. Only after such a consultation might the client realize that an "uncontested" divorce necessitated the drafting of an appropriate alimony or child custody and support agreement. To the extent that services of an attorney are necessary in these and other related matters, those services would not be covered by the advertised fee for an "uncontested divorce." The layman may be misled by the advertisement because he has no inkling whether additional services may be advisable, whether the advertising lawyer is able or willing to perform such services, or whether the cost of such additional services can be compared to alternatives.

Similarly, contingencies unforeseeable by the layman may complicate an "uncontested adoption" or a bankruptcy without "contested proceedings." Appellants' advertisement may well be truthful in the sense that *stated* services would be performed for the stated amounts if no additional services were required. But the layman cannot be assumed to know whether additional services are required until he has consulted a lawyer, who can assess the client's particular problem. Appellants testified that they would prepare a "simple will" for $30. (O'Steen test., Tr. 67) This, too, if advertised

would be misleading to an individual who naively believed that a "simple will" was appropriate, even though he had no basis for accurately evaluating his own needs.

Finally, even the performance of precisely stated services of a routine nature can vary substantially in quality. For example, the timing of such services may be highly significant to a client. The lawyer who schedules a bankruptcy petition so that all claims are provable and therefore dischargeable or who assesses the federal tax laws when arranging the timing of a divorce or adoption has performed a very different "routine" service for his client.

If a layman were attracted to a lawyer by an advertisement of the type discussed above and discovered only after consulting with the attorney that his particular problem presented complications, the lawyer could either turn away the client (as is the practice of appellants, O'Steen test., Tr. 63) or could agree to perform the necessary services for an additional fee. The practice of performing additional or somewhat different services for an additional fee, despite a lower advertised fee, is a classic consumer protection problem. Yet, in the case of attorneys, this problem can not be as readily dealt with as the "bait and switch" tactics employed by certain retailers of consumer products.[5] Unlike such retailers, the attorney has an affirmative and countervailing obligation to provide additional services if appropriate for a particular client. How an attorney should respond to clients whose circumstances necessitate services more complex than those to be performed pursuant to an advertised offer is a difficult problem. The States are entitled to consider whether the dangers posed by the problem together with enforcement difficulties outweigh the value, if any, of the particular form of advertising.

[5] *Cf.*, Federal Trade Commission Guides against Bait Advertising, which provide, "No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise." 16 C.F.R. § 238.

Appellants argue that their advertising of fixed fees is somehow analogous to the practice of quoting fees over the telephone. (Appellants' Br. 17) However, the problems of misinformation posed by appellants' newspaper advertisement are not presented by this practice. A lawyer who quotes an estimated fee over the telephone, like the lawyer who quotes an estimate during an initial office consultation, has an opportunity preliminarily to ascertain the client's particular needs and to provide any necessary qualification of his estimate.[6]

The problem of deception posed by advertisements containing fee information suggests why a State might reasonably determine that such information should generally be presented, as the Arizona regulatory scheme now contemplates, during a consultation, in person or by telephone, between lawyer and client. In this sense, the advertising restrictions here are the opposite of those considered in the *Board of Pharmacy* case. In that case, published drug price information was completely comparable, and no legitimate reason existed why price information could only be obtained "by shopping from pharmacist to pharmacist." 96 S. Ct. at 1826. Here, by contrast, personal consultation

[6] Appellants also seek to analogize their advertising of set fees to the arrangement under which attorneys participating in the State Bar-sponsored prepaid legal services program agree to limit their fees for services covered by the program to specified amounts. *See also* Brief for the United States as *Amicus Curiae*, 30-31. Clients of a prepaid legal services program, however, pay a fixed premium, which entitles them to any services covered by the program and are not induced to subscribe to the program by advertisements of particular services for standardized fees. Moreover, prepaid legal services programs are very closely regulated. In any event, the important question is not whether attorneys can under some circumstances estimate the average cost of certain services, but whether the advertisement of such an average to the public may be misleading.

may provide the only means by which accurate fee information can be obtained.[7]

In devising a satisfactory solution to the problem of increasing public awareness of the availability of legal services, State regulatory authorities should be entitled to consider whether announcements about lawyers' fees are inherently non-comparative and therefore do not facilitate the process of intelligent selection of counsel. This process may actually be hindered by such advertising since the public may be induced to select counsel on the basis of confusing information. Moreover, information on fees may not even be available from conscientious attorneys who wish to avoid such confusion and misunderstanding.

The overriding public interest in commercial speech is "that [private economic] decisions, in the aggregate, be intelligent and well informed." *Board of Pharmacy*, 96 S. Ct. at 1827. This interest is directly served not only by State regulation designed to ensure that commercial information is not false or misleading but also by regulation designed to ensure that the types of commercial information that are disseminated prove accurate or meaningful.

[7] The argument is offered in the Brief of *Amici Curiae* Consumers Union of United States, Inc. *et al.*, 9-10, that lawyers cannot constitutionally "be prevented from setting standard fees to be charged by the lawyers for specified services" in advance of a consultation with the client. They rely upon *United Transportation Union, supra*, for this proposition. In that case, however, the Court held only that the right of union members "to act collectively to obtain" counsel prevented the State from enjoining an arrangement under which attorneys whom the Union believed capable agreed that their fees to union members would not exceed 25% of an individual's recovery. 401 U.S. at 584-86. The extent to which a State may regulate the fees charged by attorneys is not at issue here. Rather, the questions herein relate to the permissible scope of the public advertising of such charges. It does not follow as a matter of law or logic that any lawful practice may lawfully be advertised. As explained *supra*, there are a variety of bases upon which a lawyer may lawfully calculate his fee, including hourly rates, but the advertising of such bases may pose the danger of misinterpretation and may properly be subject to State regulation.

2. The Disparity of Knowledge between Lawyer and Layman with Respect to Legal Matters Hinders the Layman in Accurately Assessing His Own Needs before Consulting a Lawyer and Thus Deprives Him of Information That May Be Essential to a Fair Analysis of Advertising Claims.

Although some general objective or problem commonly prompts the layman to seek the advice of an attorney, the layman depends upon the attorney not only to perform whatever services are necessary but also preliminarily to diagnose the layman's needs. Since the layman may thus lack critical information about his own circumstances before consulting a lawyer, the layman may lack the very knowledge which is necessary fairly to evaluate advertising claims.

Contrary to the simplified version of the lawyer's role implicit in appellants' arguments, in their description of their "systems approach" to the practice of law (Appellants' Br. 7-9), and in their advertisement itself, the lawyer, like the physician, is not merely a purveyor of services. Physicians and lawyers "do not dispense standardized products" but rather "render professional services of almost infinite variety and nature . . ." *Board of Pharmacy,* 96 S. Ct. at 1831, n. 25. Consequently, the task of assessing an individual's *particular* needs is at least as important as the actual performance of the appropriate services.

This diagnostic aspect of professional services distinguishes them from the types of services or products that are customarily advertised. Unlike the prospective purchaser of housewares or clothing or prescription drugs, the prospective purchaser of legal services is likely to have only a vague and possibly inaccurate perception of his needs. Without a satisfactory basis for assessing the relative sim-

plicity or complexity of his particular problem, the layman may lack information that is essential to a meaningful and fair evaluation of advertising claims.

At the threshold, the layman may be unable independently to determine even whether the assistance of a lawyer is necessary. For example, in Arizona, many changes of name are routinely effected without retaining counsel. Yet appellants' advertisement in this case offers a change of name for $95 plus $20 court filing fee, and appellants testified that clients responding to this advertisement would not necessarily be turned away. As O'Steen explained, "it's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." (T. 72) Such a view is utterly inconsistent with the obligations and responsibilities of a professional.

Appellants defend this outlandish attitude by arguing that the "only meaning that can sensibly be ascribed to the term 'need'" is that "a person needs a lawyer when he feels the need of a lawyer's assistance in doing that which lawyers usually do." (Appellants' Br. 47) However, one obligation of an ethical attorney is to advise a client that he does *not* need an attorney to accomplish his end if such is the case. A person has traditionally been understood to need a lawyer's services when an attorney who is aware of the client's particular problems determines in the exercise of his independent professional judgment that services are warranted.

Advertising of purportedly standardized services at set fees may be used to encourage clients to ask for costly and superfluous services while at the same time, as the above example illustrates, decreasing the probability that an attorney will fulfill his "diagnostic" obligations or that a client will understand that he has such obligations. Preventing such a result is a legitimate concern of State regulation.

3. Advertising by Lawyers May Adversely Affect the Quality of Services Offered and the Structure of the Profession.

Widespread advertising of legal services and of fee information may affect the quality of such services by limiting the flexibility of the lawyer's response to the needs of individual clients. The lawyer who advertises his willingness to perform a particular function for a specified amount must have a preconception of the package of services which he expects to perform. Rather than turn away a prospective client who is unaware that the offered package is inappropriate for his special needs and rather than perform the needed services, the lawyer may provide the standard package, even if it is not an exact fit. While this may be particularly so in the case of the so-called "legal clinic," such as that operated by appellants, which relies so heavily on legal assistants (Appellants Br. 7; O'Steen test., Tr. 47-49), in the case of the individual practitioner, the announced willingness to perform specified services for specified fees also may lessen the likelihood of the services being adapted to the needs of the client.[8]

The quality of legal services provided would also be affected if the independent judgment of an attorney who

[8] The conscientious attorney recognizes that it is his responsibility to ascertain the precise needs of his clients and to provide services adapted to those needs. The question therefore arises whether the most competent attorneys, recognizing this professional responsibility, would be willing to advertise a "standardized" package of services, even if such advertising were permitted. Until 1959, attorneys practicing before the Patent Office were allowed to use advertising matter, circulars, letters, and cards to solicit patent business, provided copies were first submitted to the Commissioner of Patents for approval. Statements by three former Commissioners of Patents at the public hearings leading to the 1959 rule revision indicated that the services of the small percentage of practitioners who advertised were of poorer quality and more expensive than those rendered by other practitioners

(footnote continued on following page)

advertised were thereby compromised. Certainly, the independent judgment of an attorney may be affected by his desire to persuade a potential client to purchase his services. An attorney who seeks to convince someone to engage him before the attorney has been apprised of that person's particular situation is not exercising independent professional judgment, and it may be difficult for that attorney later to advise the client not to take the legal action which the attorney previously recommended. For example, an attorney who published an advertisement appealing specifically to victims of an alleged violation of antitrust, securities, or consumer protection laws would likely be hesitant candidly to advise clients thereby attracted that their claims were not meritorious even if his more complete knowledge of the facts so indicated.

This concern was recognized in *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1960), where the Court noted that forms of advertising or solicitation may be "inconsistent with the personally disinterested position a lawyer should maintain." The problem is manifested in this case, since petitioners have conceded their reluctance to turn away a client seeking a name change who may respond to appellants' advertising but who may not require the assistance of counsel.

Every attorney can think of numerous instances in which the advertising of a standardized fee could affect profes-

(continued from preceding page)

and more frequently occasioned client complaints. Hearing on Proposed Amendment of Patent Office Rule 1.345, U.S. Dept. of Commerce, at 188, 190, 196 (Nov. 19-20, 1957). Legitimate concern may exist about the capability and professional judgment of the attorney who would seek to take maximum advantage of the opportunity to persuade the public to purchase the services he offered. No one can predict whether this danger exists in all circumstances, but the States are certainly entitled to consider it.

sional judgment and the quality of legal services in both obvious and subtle fashions. For example, the advertising of a standardized will at a standardized fee may increase the danger that a particular client will accept, or that a lawyer will provide, such a will even though a more complicated will would be preferable. Few clients request "complex" wills, and even those with complex problems usually want something simple.

In addition to affecting the quality of services provided, advertising may also adversely affect the structure of the profession. In *Goldfarb,* the Court referred to the "public service aspect" of the professions that serves to distinguish them from other business activities.[9] Members of the profession, although profit-motivated, have a broad social responsibility. Because "lawyers are essential to the primary governmental function of administering justice," they have traditionally accepted the obligation to represent indigents and other persons unable to pay fees customarily charged. 421 U.S. at 792. This notion gives rise to the basic principle that fees, while obviously related to the services performed, should also reflect any peculiar circumstances including financial ability of a particular client. The increased rigidity of the fee structure to which widespread advertising of standardized fees would contribute may be fundamentally inconsistent with this recognized "public service aspect" of the legal profession. Once again, the States are entitled to consider this problem.

[9] Specific examples of the public service aspect of the legal profession may be found in the record in this case. Certain members of the Arizona Bar were polled so as to determine their civic contributions through performance of services without or at reduced compensation, and the results are included in Bar Ex.17.

4. The Interest of the States in Having Objective and Self-Enforcing Regulations Is Entitled to Great Weight.

While, in a theoretical sense, it may be desirable for all regulations imposed by the States to be as closely related as possible to the social concerns underlying the regulations, the States also have a legitimate interest in having regulations which are objective, which are self-enforcing, and which are practicable to police.[10] These criteria of practicability might not be satisfied by rules which seek to evaluate newspaper and other advertising on a case by case basis.

Even as to ordinary consumer products, the problem of deception and consumer misunderstanding has necessitated the promulgation by the Federal Trade Commission of frequent and minutely detailed trade practice rules.[11] Dangers posed by the advertising of legal services are substantially more complex, given the variables arising in individual circumstances, the public's lack of expertise as to legal matters, and the various problems discussed above.

Existing disciplinary resources are completely inadequate to police individual advertisements on a case-by-case basis. In addition, advertisements distributed through particular media, such as daily local newspapers, might escape the notice of State regulatory authorities. Moreover, any substantial volume of lawyer advertising would preclude satisfactory review of such advertising by State authorities.

[10] An obvious example of a regulation that serves this governmental interest by drawing a bright line is Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), which prohibits a broad category of transactions in order to curb problems of insider trading. As noted in *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 422 (1972),

> " 'This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect.' Bershad v. McDonough, 428 F.2d 693, 696."

[11] Federal Trade Commission Guides and Trade Practice Rules for particular industries, occupying more than 800 pages, may be found at 16 C.F.R. §§ 25-259.

Nor is it likely that adherence to regulations would be significantly encouraged by the threat of private actions. Apart from the possible reluctance of laymen to bring lawsuits against lawyers, the small amounts involved and the difficulty of proving actual injury caused by an improper advertisement make it unlikely that individuals' claims would be vindicated. Furthermore, if the consequence of the attorney's misconduct were misperformed services, for example, in connection with a simple will or an uncontested adoption, this may not become known for many years, further thwarting effective private enforcement.

The interest of the States in promulgating plain, enforceable regulations is closely related to the reasons why the overbreadth doctrine should not be applied to commercial speech. Nevertheless, the Department of Justice, while acknowledging that advertising by lawyers may be closely regulated (Brief of the United States as Amicus Curiae, 29-35), asserts that the Arizona rules are overbroad and suggests that such rules might be narrowed to prohibit only advertising that is "deceptive, misleading, unfair, undignified or likely to bring the legal profession into disrepute". (Brief of the United States, 22)

Not only are these suggested standards utterly unenforceable, but the existence of such imprecise rules would also encourage discriminatory and arbitrary sanctions against individual attorneys. Moreover, the imposition of sanctions pursuant to such standards would raise additional constitutional difficulties of vagueness and due process. In light of the inherent deception and unfairness of most advertising by attorneys and in light of the difficulties of enforcement, no regulatory body has adopted such vague rules. Instead,

numerous authorities, including various departments and agencies of the United States, whose regulations are neither discussed nor defended by the Brief of the United States, have wisely chosen clear, enforceable proscriptions.[12]

The problem of framing regulations that would authorize additional devices for informing the public about the availability of legal services and that would at the same time prevent potential abuses in a clear and enforceable manner is a difficult one and has contributed to the cautiousness of the States in modifying their regulations. The States are plainly entitled to consider the practical possibility of implementing the approach advocated by appellants in determining the forms of lawyer advertising that are to be permitted.

C. Widely Varying Approaches Have Been Advocated And Followed In Connection With Expansion Of Ways In Which Information On Legal Services May Be Disseminated To The Public.

Prompted by the growth of group legal services programs and other new methods of delivering legal services to the public, the States have in recent years experimented with a variety of approaches to the dissemination of information about the availability of legal services. Even among individuals who favor changing regulations on professional advertising, however, there is wide disagreement about the most advisable approach to be followed. Important differences among the proposals which have been advocated strongly support the position that great flexibility should be accorded the States to respond to the concerns discussed above.

[12] *See, e.g.*, rules on advertising and solicitation applicable to attorneys practicing before the Department of Justice Immigration and Naturalization Service, 8 C.F.R. § 292.3(a)(5), (6); the Interstate Commerce Commission, 49 C.F.R. § 1100.13 and Appendix A to Part 1100, Rules 32-34; or the Internal Revenue Service, 31 C.F.R. § 10.30.

Differing views on this subject were fully aired during a series of hearings conducted by *amicus* American Bar Association in the fall of 1975. Among persons invited to testify were representatives of consumer groups, Justice Department officials, law professors, and State disciplinary authorities. While a few witnesses urged the removal of most restrictions on lawyer advertising, many of the witnesses supporting relaxation of these restrictions advocated a more selective approach. Some thought the best way to serve the public's need for additional information was to expand the categories of information that could be included in legal directories and law lists rather than to authorize unrestricted advertising by private attorneys. The contents of these directories could more readily be subjected to State supervision than could advertisements of low visibility published randomly by individual practitioners. Others favored increased efforts by bar association lawyer referral services to educate laymen through effective use of the media. Still other witnesses believed that advertising by private attorneys should be permitted, but that the permissible types of information and media should be specifically prescribed.

Following these hearings, the American Bar Association amended its model Code of Professional Responsibility, which it publishes as a recommendation to regulatory authorities. If adopted by a State, the rules now recommended by the ABA would permit the publication in a reputable law list, legal directory, or the yellow pages of a telephone directory of a variety of information, including whether credit cards or other credit arrangements are accepted, office hours, a statement of fees for an initial consultation, and the availability of other fee information on request, the request providing an opportunity for personal consultation. (ABA Code of Professional Responsibility, DR 2-102(A)(6)) This recommendation would significantly ex-

pand the information to be included in legal directories, including those prepared by consumer groups and more importantly, telephone directories. The classified section of the telephone book is a significant medium for consumers of legal services and is also a medium which permits efficient regulatory scrutiny. The ABA's recommended rule has not been adopted by Arizona, but even if adopted, it would not sanction an advertisement like that published by appellants in this case.

A somewhat different regulatory scheme, approved by the Board of Governors of the State Bar of California and now before the State Supreme Court, would also prohibit an advertisement like that published by appellants here. The proposed California rules on "public information communications" are also premised on the determination that law lists, legal directories, and telephone books, rather than individual advertisements, should be utilized to disseminate information about the availability of legal services.

The proposed California rules would also require that information be presented "in substantially the . . . form and language" set forth. (Rule 2-102(B)(3)) In this way, the rules seek to minimize the danger of deception otherwise inherent in announcements pertaining to subjects with which the layman is unfamiliar. For example, although the rules would permit the publication of information on hourly fees or on fees charged for specific types of services, they would affirmatively require that it be published "*together with* all of the variables and other relevant factors that could affect the amounts of the stated fees." (Rule 2-102(B)(3)(m), (n)) In all, the rules would provide acceptable form and language for 38 categories of information, demonstrating the complexity of problems that may arise in connection even with what is seemingly a straightforward

and simple announcement. Problems of supervision and control, although not eliminated, would be somewhat more manageable if information to be published were thus limited with respect to form and language and were thus restricted to publication in a limited number of widely circulated directories. Both the new recommended ABA rules and the proposed California rules would draw a principled distinction between advertisements like appellants', which they would continue to prohibit, and other forms of information dissemination which they would authorize.

Still another approach has recently been proposed by the Board of Governors of the District of Columbia Bar and is now pending before the District of Columbia Court of Appeals.[13] It would prohibit a lawyer from making "false or misleading" representations (DR 2-101, 102) as well as from engaging in certain other practices, including soliciting or advertising "in any way that would violate a valid law or regulation, or a contractual or other obligation of the person through whom the lawyer seeks to communicate." (DR 2-103) In addition, the proposal would caution lawyers to disclose any "additional information that is accurate and that might assist a potential client in making an informed choice of an attorney", to "avoid creating unrealistic expectations", and "to provide information to the public in ways that comport with the dignity of the profession and that do not tend to demean the administration of justice." (EC 2-10) Given the likelihood of confusion or misapprehension presented by appellants' advertisement here, it may well be prohibited by these rules. In any event, the District of Columbia is the only jurisdiction actively considering such generalized prohibitions; and if these amendments are approved, the experience in this

---

[13] This proposal is reproduced in Appendix B to the Brief of the United States as *Amicus Curiae*.

single metropolitan area will be useful to State regulatory authorities in assessing the consequences of such modifications and the practicability of the guidelines set forth.[14]

D. In View Of The Uncertainty That Exists About The Consequences Of Relaxing Restrictions On Advertising, The First Amendment Should Be Interpreted To Allow The States Great Flexibility In Developing Approaches To Advertising By Lawyers.

Because of the lack of experience with advertising by lawyers, because of the uncertainty as to the consequences of removing existing restrictions, and because of the diversity of informed opinion as to the best method for increasing the dissemination of information, the States should be permitted to approach the question of lawyer advertising in a variety of ways. State regulatory authorities are able to take into account significant differences in the manner in which legal services are delivered in various regions of the country. Methods of informing the public about the availability of legal services which would be appropriate in New York or Los Angeles may well be inappropriate in Montana. Appellants themselves acknowledge that necessary means of informing the public about legal services may vary, de-

[14] Another approach to the question of "publicity and advertising" is suggested by the proposed rule contained in the Brief *Amicus Curiae* of the Chicago Council of Lawyers, Appendix A. This proposal would permit a communication "limited to one or more of" eight specified types of information. While the guidelines are not precisely defined, none of the permissible categories of information would seem to include an announcement like that of appellants. The Council's proposal also contains a number of general prohibitions, including a prohibition against the communication of "any estimate, promise or prediction of the result of any future legal proceeding" or "any comparative statement regarding any other lawyer" irrespective of accuracy. The rule would further require that all information be communicated "in a direct and readily comprehensible manner." A range of concerns is thus reflected in the Council's approach, some of which are additional concerns beyond those reflected in other proposals discussed *supra*.

pending upon the urban or essentially rural nature of the area. (Appellants' Br. 34-35) No rigid rule of constitutional law should discourage the diversity and experimentation in this area which the federal system would otherwise foster.

In recent decisions, this Court has recognized that the First Amendment should be interpreted so as to allow the States considerable latitude in formulating measures for dealing with types of speech reasonably deemed by the States to be incompatible with the public interest. For example, with respect to enforcement of obscenity laws, in *Miller* v. *California,* 413 U.S. 15, 32-33 (1973), the Court, while delineating a narrow category of speech under all circumstances entitled to protection, held that contemporary community standards rather than a national uniform standard could be followed:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposing uniformity."

Similarly, recognizing the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court held in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 347 (1974) that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood to a private individual."

The considerations underlying the *Miller* and *Gertz* decisions are even more forceful in the present context because those decisions did not involve economic regulation and "commercial speech" and because the States have "a

compelling interest in the practice of professions" and "broad power to establish standards for licensing practitioners and for regulating the practice of professions." *Goldfarb,* 421 U.S. at 792. The Court has consistently refused to strike down on broad constitutional grounds State regulations pertaining to professional or business conduct. *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156, 164-167 (1973); *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963); *Daniel* v. *Family Security Life Ins. Co.,* 336 U.S. 220 (1949). In *Ferguson,* the Court upheld the constitutionality of the State statute prohibiting any person from engaging in the business of debt adjusting except as "the lawful incident of the practice of law." Emphasizing that a State has "broad scope to experiment with economic problems," the Court reiterated the principle that it "does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government. . . .' " 372 U.S. at 730.

Not to accord the States broad scope to deal with the problems of lawyer advertising would be to invoke the First Amendment in a manner long since rejected with respect to the Fourteenth Amendment. *Nebbia* v. *New York,* 291 U.S. 502 (1934). As the Court explained in *Ferguson,*

> ". . . we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' " 372 U.S. at 731-732.

The long tradition of restrictions on advertising by lawyers, the necessary uncertainty about the consequences of removing those restrictions, and the attention now being given these regulations by bar associations and State authorities

suggest that the wisdom of particular regulations and the approach to be followed in relaxing restrictions should be determined by the States.

E. The Issue In This Case Is Whether The State Of Arizona Is Required By The Constitution To Permit Advertisements Like That Published By Appellants.

Appellants' characterization of this case as involving the legality of a "total ban on advertising by private practitioners" (Appellants' Br. 2) can only serve to confuse the most important issue. A more accurate formulation of the question presented here is whether, as a matter of constitutional law, a State must authorize price advertisements, like that published by appellants, as a part of its regulatory scheme.

Although the Arizona rules do not permit such newspaper advertising, they provide for a number of other methods of disseminating information about the availability of legal services. For example, the Arizona regulatory scheme contemplates the existence of bar association lawyer referral services (DR2-103(C)); the dissemination of information about rights, remedies, and the availability of services by such lawyer referral services (DR2-103(D)(3));[15] the operation and promotion of group legal services programs (DR2-103(D)(4)); as well as the dissemination

[15] Appellants' own arguments demonstrate the effectiveness of advertising by bar association lawyer referral services in increasing public awareness of legal services. (Appellants' Br. 37-38) While serving an information function, such advertisements are able to avoid certain abuses resulting from direct and purposeful efforts by individual lawyers to persuade laymen to hire these particular lawyers. Although advertising by lawyer referral services is a recent development, almost 40 percent of the respondents in one national survey stated that they had heard of a lawyer referral service. Curran and Spalding, *The Legal Needs of the Public,* 89 (Am. B. Found. 1974).

of information through law lists, legal directories, and other announcements as set forth in DR2-102(A).

Moreover, in adopting its Code of Professional Responsibility, the Arizona Supreme Court added to the rules then recommended by the ABA a new subsection DR2-103(D)(5), which permits advertising by a public interest law firm. Under the Arizona rule, a non-profit firm which provides without cost or at reduced fees services that would not be provided by a governmental agency, which is approved by the Board of Governors of the State Bar, and which deals with problems of poverty law, individual civil rights law, public rights law, or charitable organization representation may promote the availability of its services without restriction. This rule is designed, in part, to permit the dissemination of information on "legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel." (DR2-103(D)(5)(a)) The Arizona rules thus permit a category of advertising that would be prohibited under both the currently recommended ABA rules and the proposed California regulations. While these latter regulatory schemes would authorize some additional methods of disseminating information, neither set of rules would permit newspaper advertising of the type used by appellants here.

The question now presented, however, is not whether the States should or must sanction devices other than unrestricted newspaper advertising. Rather the narrow question before the Court is whether a State can constitutionally refuse to sanction unrestricted newspaper advertising of prices of purportedly standardized services. That the regulation challenged by appellants prohibits forms of conduct other than that in which appellants engaged is not directly relevant in assessing the constitutionality of an application of the Arizona regulation to their conduct.

Assuming *arguendo* that their own advertisement could have been properly prohibited by a narrower regulation, appellants nevertheless challenge the regulation on grounds of overbreadth.[16] (Appellants' Br. 51-54) The overbreadth doctrine has been invoked to strike down regulations that might chill ideological speech and that might be randomly and discriminatorily applied to censor unpopular views. *See,* Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 918-927 (1970).

The overbreadth doctrine loses much of its force when commercial behavior rather than ideological speech is at issue. Not only is there less likelihood that regulations concerning commercial behavior could be used discriminatorily to restrict the dissemination of unpopular ideas but also there is less likelihood of their having a chilling effect on commercial advertisers. As noted in the *Board of Pharmacy* case, "commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." 96 S.Ct. at 1830, n. 24. Moreover, the public's interest in tolerating marginal conduct differs radically when commercial rather than ideological speech is involved.

An analogy may be drawn to statutes regulating the advertising of registered securities, which broadly prohibit all such advertising except in certain prescribed ways, such as by prospectus or by "tombstone" advertisement. Securities Act of 1933, 15 U.S.C. §§ 77b(10), 77(e). Such regulations are obviously "overbroad" in the sense that they prohibit the dissemination of certain helpful and informative mes-

[16] Appellants also invoke the least drastic means doctrine. (Appellants Br. 51-54) This Court has never held that either doctrine is applicable to "commercial speech" and to do so would severely undercut Congressional and State economic regulation.

sages that would not be in any way deceptive. Yet no one would reasonably suggest that the overbreadth doctrine should be available to challenge this regulatory scheme under the First Amendment. Although "overbroad," this scheme which regulates commercial speech is reasonable because it is, in the main, supportive of legitimate social ends and because it is justified by considerations of practicability. The rules of the Federal Trade Commission provide dozens of other examples of such "overbreadth." Indeed, economic regulations must be "overbroad" in order to be effective.

The great sweep of governmental authority to regulate "commercial and business affairs" even in the face of the First Amendment was recently noted by the Court:

> "On the basis of [various unprovable] assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and must not publish and announce." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61-62 (1973).

Application of the overbreadth doctrine to commercial speech would invalidate numerous statutes and regulations governing advertising and undercut the power of Congress and the States effectively to regulate such advertising. The Court has never before held this doctrine applicable to economic matters such as advertising. The constitutional question presented by this case is not whether the Arizona rules are overbroad but whether there is any recognizable State interest supporting the prohibition of unrestricted newspaper advertising by appellants.

II. THE SHERMAN ACT DOES NOT APPLY TO RULES ON LAWYER ADVERTISING WHICH HAVE BEEN ADOPTED BY THE SUPREME COURT OF ARIZONA.

Appellants' alternative basis for attacking the regulations under which they were disciplined is the Sherman Act. This challenge should be rejected since the regulations on advertising at issue in this case are contained in Rule 29(a) of the Rules of the Supreme Court of Arizona and are protected by a long-standing and well-recognized exemption from the federal antitrust laws, which prevents the application of the Sherman Act to a regulatory scheme imposed by a State acting as sovereign. *Parker* v. *Brown*, 317 U.S. 341 (1943).[17]

The suggestion has been made by appellants that the applicability of the *Parker* doctrine to the rules now challenged is somehow vitiated by the "private origin" of these regulations. (Appellants' Br. 60-64) They assert that the prohibition of lawyer advertising "originated with the private American Bar Association" (*id.* 60), and that this case may therefore be analogized to *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (1976).

---

[17] The United States in its Brief as *Amicus Curiae* acknowledges that the Arizona rule is outside the scope of the antitrust laws by virtue of the state action exemption to those laws, but nonetheless goes on to assert that the advertising ban "violates the substantive standards of the antitrust laws." (Brief of the United States, 12-15) In light of the plain application of the state action exemption and the fact that the present record contains virtually no factual or legal consideration of the "substantive standards of the antitrust laws," this *amicus* respectfully suggests that any such consideration should be deferred to other proceedings, including the action currently pending between the United States and the American Bar Association, No. 76-C-3475 (N.D. Ill., filed June 25, 1976). Accordingly, this Brief does not address such issues except to state that neither the case law nor economic analysis nor the record below supports the Government's blanket assertions.

In *Cantor,* the Court held that the antitrust laws were applicable to a light bulb program implemented by a Michigan utility pursuant to a tariff filed by the utility with a State commission regulating the distribution of electricity. In reaching this result, the Court relied upon the absence of "any statewide policy relating to light bulbs," the State's neutrality as to the desirability of the program, and the "freedom of choice" exercised by the private party. The Court pointed out that "[t]he distribution of electric light bulbs in Michigan is unregulated" and that the provision of light bulbs was a matter totally outside the regulatory interest of the Commission. In addition, other utilities regulated by the Commission did not follow the practice of providing bulbs to customers without additional charge. 96 S.Ct. at 3114. It was thus not the "private origin" of the program in *Cantor* that brought it within the sweep of the antitrust laws, as appellants now urge, but rather the failure of the State to have directed that such a program be implemented.

In the present case, by contrast, a statewide policy with respect to lawyer advertising has plainly been articulated by the State acting as a sovereign. Unlike the approval of the light bulb tariff by the Michigan Public Utility Commission in *Cantor,* the adoption of ethical rules by the Arizona Supreme Court was not a perfunctory act. To the contrary, the Arizona Supreme Court modified the recommended ABA rules, as explained *supra,* and has *twice* determined that the particular regulations now challenged serve the public interest—i.e., first when they were adopted and secondly during the proceedings below. Moreover, the regulatory scheme was initially imposed by order of the Arizona Supreme Court pursuant to procedures prescribed by statute (Ariz. Rev. Stat., § 32-231 *et seq.*).

Even without any legislative mandate, the highest court of the State could itself articulate statewide policy with respect to lawyer advertising which would constitute action of the State as sovereign. Unlike the Michigan Public Service Commission, which is a creature of the legislature, the Arizona Supreme Court is a separate and coordinate branch of government, which does not derive its inherent power from the legislature. As recognized by Chief Justice Marshall, the authority to regulate and discipline members of the legal profession has traditionally been considered "incidental to all courts." *Ex Parte Burr,* 22 U.S. (9 Wheat.) 529 (1824). *See, In re Bailey,* 30 Ariz. 407, 248 P. 29 (1926). *See also,* Appellants' Br. 61-62, n. 13. Thus, unlike the Michigan Public Service Commission, the Arizona Supreme Court had ample and specific authority to articulate State policy as to the matters with which the challenged regulations are concerned.

That the advertising rules now challenged may have been patterned after provisions of the model Code of Professional Responsibility drafted by *amicus* American Bar Association, a private, voluntary association, is irrelevant. The ABA first published its model Code in 1969, as a recommendation to State authorities responsible for regulating the professional conduct of lawyers. Many States have subsequently adopted ethical rules similar to those contained in the model ABA Code, although no State has adopted rules identical to those in the current ABA Code. The ABA does not enforce its model Code. Rather the ABA's role is comparable to the function performed by the American Law Institute in drafting and recommending uniform statutes.

Many of the regulations and statutes adopted by the federal government and by the States were proposed by private parties, exercising their rights under the First

Amendment. Appellants' notion that the state action exemption may somehow be lost where State regulatory action has been initially advocated by private parties would be directly inconsistent with the *Parker* decision itself—a case in which the challenged marketing plan was adopted upon the petition of private producers. 317 U.S. at 346-47. Appellants' argument would also be inconsistent with decisions of this Court holding that the federal antitrust laws must not be interpreted so as to interfere with legitimate efforts to influence governmental action. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).[18] There is no authority in *Cantor* or elsewhere for the notion that rules promulgated by the Arizona Supreme Court are cognizable under the antitrust laws merely because the Court's rules are modeled on proposals drafted by the American Bar Association.

Appellants also urge that the State regulatory scheme and the rules which it comprises should not be "automatically" exempted from the federal antitrust laws (Appellants' Br. 70), relying on dicta in *Cantor* that the *Parker* doctrine might not be invoked where a State's interest in a regulation is "peripheral or casual" or where the reasons for granting the antitrust exemption are "wholly unrelated either to federal policy or even to any necessary significant

[18] Appellants argue that "a private agreement by the American Bar Association and the State Bar of Arizona to prohibit price advertising is subject to the federal antitrust laws" and that "no immunity is gained by their success in having the prohibition written into the command of the Arizona Supreme Court." (Appellants' Br. 64) There is no evidence in the record of any such "agreement." Moreover, this argument relies upon a misrepresentation of the ABA's role in recommending a model Code of Professional Responsibility; it also formulates the applicable legal principles in a way that would broadly and directly impinge upon the First Amendment rights of private parties to petition the Government.

State interest." 96 S.Ct. at 3123. This language is plainly not controlling here, since, as explicitly recognized in *Goldfarb*, "the States have a compelling interest in the practice of professions within their boundaries. . . ." 421 U.S. at 792. Whatever may be applicability or inapplicability of the *Parker* doctrine in other contexts where the interest of the State is peripheral, it is clear that the interest of the States in the regulation of the ethical conduct of lawyers is sufficient to warrant applicability of the doctrine.

CONCLUSION

Careful analysis of the recent *Bigelow* and *Board of Pharmacy* decisions reveals that no legitimate State interest supported the restrictions on advertising challenged in those cases. In sharp contrast, there is virtually universal agreement that advertising by attorneys poses serious and complicated problems and that close regulation of such advertising is supported by several substantial State interests. Disagreement exists only as to the precise type of regulatory system that is preferable as a matter of social policy. The American Bar Association has recently changed its recommended rules concerning advertising, and committees and members of the ABA continue to debate the optimal approach. Various States, such as Arizona, which have not adopted the ABA's recommendation hold still other views. This disagreement results from differences of opinion concerning the likelihood and magnitude of the purported advantages and dangers of advertising by attorneys. Put another way, there are important, legitimate State interests supporting Arizona's prohibition of price and other advertising by attorneys, but persons in good faith disagree as a matter of public policy concerning where regulatory lines should be drawn and the proper ranking of economic and regulatory priorities.

It is highly significant that the Department of Justice and other *amici* supporting some of appellants' contentions refrain from endorsing the actual conduct of appellants and instead focus on the alleged overbreadth of the Arizona system. The reason for this focus on the overbreadth doctrine is plain. Unless the Court is prepared to embark on a new course of judicial intervention into the economic regulation of advertising, appellants' conduct can be constitutionally prohibited. Not only are the dangers posed by appellants' particular advertisement sufficient by themselves to support a judgment by a State to prohibit such an advertisement, but appellants' admitted practice of advertising for clients and then neglecting to inform such clients that services may not be needed can be prohibited under a variety of constitutional and socially beneficial regulatory schemes.

In a sense, therefore, this case reduces to the question whether the Arizona rules governing advertising are invalid because they prohibit more than is prohibited by other rules in effect elsewhere or other rules recommended by the ABA or other organizations and entities. There is no decision of this Court requiring the application of the delicate and complicated doctrine of overbreadth to commercial speech, and such an application would directly interfere with countless examples of economic regulation by Congress and the States.

Under these circumstances, the judgment of the Supreme Court of Arizona should be affirmed.

December 17, 1976

Respectfully submitted,

JUSTIN A. STANLEY
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

H. BLAIR WHITE
ROBERT D. MCLEAN
DAVID T. PRITIKIN
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
Attorneys for Amicus Curiae, American Bar Association